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PEARNE & GORDON LLP
1801 EAST 9TH STREET
SUITE 1200
CLEVELAND, OH 44114-3108

EXAMINER

LEE, LAURA MICHELLE

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ULRICH CARLIN NIELSEN

Appeal 2015-004666
Application 10/599,602
Technology Center 3700

Before CHARLES N. GREENHUT, LISA M. GUIJT, and
NATHAN A. ENGELS, *Administrative Patent Judges*.

ENGELS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant appeals under 35 U.S.C. § 134(a) from the Examiner's Non-final Rejection of claims 55–69. Claims 1–54 are canceled. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

ILLUSTRATIVE CLAIM

Appellant's claimed invention relates to a method for cutting food items into pieces having predetermined dimensions. Appellant's invention includes a first cutting device and a plurality of second cutting devices. Reply Br. 4. According to Appellant, at the first cutting device, food items are measured and "a complete cutting profile is created to determine the entire cutting sequence for all cutting devices," including a first cutting profile to be performed by the first cutting device and a second cutting profile to be performed at a second cutting device. Reply Br. 4 (citing Spec. 4, ll. 13–15). The second cutting profile that is determined by the first cutting device is referred to in Appellant's claims as the "first second cutting profile." Reply Br. 5.

After the first cutting device cuts the food items into strips according to the first cutting profile, the strips of food are transported to a second cutting device. "[A]t the second cutting device . . . a new measurement is taken (to adjust for any changes due to shifting or other cause), and a cutting profile for that device is prepared (i.e., the *second second cutting profile*)."

Reply Br. 6.

Claim 64, reproduced below, is illustrative of the claimed subject matter:

64. A method for portion cutting a food item into pieces having predetermined dimensions, comprising the steps of:

using a first measuring device for performing a first measuring step of measuring a shape, structure, and/or dimension of the food item;

using a result of said first measuring step for automatically determining a cutting sequence for cutting said food item into pieces having said predetermined dimensions, said cutting

sequence including a first cutting profile for first cutting said food item into a plurality of strips, and also including a first second cutting profile for cutting each one of said strips into pieces having said predetermined dimensions;

automatically cutting said food item into said strips at a first cutting device according to said first cutting profile;

transporting said strips toward a plurality of second cutting devices, wherein each one of said strips is further transported to a selected one of the plurality of second cutting devices;

for each one of the strips, using a further measuring device located at the second cutting device for which the strip was selected for performing a second measuring step of measuring a shape, structure, and/or dimension of each one of the strips;

for each one of said strips, using a result of said second measuring step for automatically determining a second second cutting profile for cutting each one of said strips into pieces having said predetermined dimensions, wherein said second second cutting profile is different than said first second cutting profile; and

automatically cutting said strips into pieces having said predetermined dimensions using the selected second cutting devices.

THE REJECTIONS

Claims 55–69 stand rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement, and under 35 U.S.C. § 112, second paragraph, as being indefinite.

Claims 55–69 also stand rejected under 35 U.S.C. § 103(a) as being unpatentable in view of Rudy et al. (US 4,875,254; Oct. 24, 1989) and Kim et al. (US 2003/0145699 A1; Aug. 7, 2003).

ANALYSIS

I. The Obviousness Rejection

Having considered the Examiner's obviousness rejection of claims 55–69 under §103(a) in light of each of Appellant's arguments and the evidence of record, we disagree with Appellant and agree with the Examiner. We adopt as our own the Examiner's findings, conclusions, and reasons, and we address certain of Appellant's arguments below primarily for emphasis.

A. Independent Claims 55,¹ 61, and 64

Appellant first argues the cited prior art fails to teach or suggest a “plurality of second cutting devices” and related limitations as recited in claims 55–69. App. Br. 24–25. Appellant argues “Rudy teaches only two cutters, both of which are located at a *single* second cutting station . . . [and] attached to the same support carriage.” App. Br. 25. According to Appellant, the claimed cutting devices “when read in light of the [S]pecification and in view of FIG. 1, comprise more than a mere plurality of individual cutters mounted on the same support carriage.” App. Br. 25.

We disagree with Appellant. As cited by the Examiner, Rudy discloses an apparatus having conveyor belts to move food pieces from a first measuring device and a first cutter at an “infeed end” past additional measuring devices and additional cutters at an “outfeed end.” *See* Rudy

¹ Appellant's Reply Brief states that the section titles of Appellant's Appeal Brief erroneously reference only independent claims 61 and 64 and that Appellant's arguments apply to independent claim 55. Reply Br. 13. We consider Appellant's arguments to be applicable to claim 55 and its dependent claims.

Figs. 1–4, col. 2, ll. 34–42 (describing the relationship of the infeed end depicted in Figures 1 and 2 and the outfeed end depicted in Figures 3 and 4), col. 4, ll. 26–31 (describing camera 72 at the infeed end), col. 5, ll. 41–68 (describing a cutter at the infeed end), col. 6, l. 55–col. 7, l. 65 (describing the second scanning system and cutters at the outfeed end). Contrary to Appellant’s arguments, neither the claim language nor Appellant’s Specification defines the recited “plurality of second cutting devices” to require related structures such as multiple support carriages or other structures in a way that would exclude the plurality of cutting devices at the outfeed end taught by Rudy.

In addition, contrary to Appellant’s arguments that Rudy fails to teach “transporting” food items or strips from the first cutting device to the second cutting device (*see* App. Br. 26–27; Reply Br. 10–11), Rudy teaches food pieces “progress forward” on a series of conveyor belts from the first cutter to the second scanning system and second cutters (Rudy col. 7, l. 46–col. 8, l. 9). *See also* Rudy, Abstract (“Food products . . . are cut to predetermined portion sizes . . . by moving the food products on a conveyor, scanning them as they move through a shadow line with a camera capable of providing a programmed computer with dimensional data, and utilizing the computer to control the operation of a plurality of high pressure water jet cutters”). Contrary to Appellant’s arguments (App. Br. 26), neither the claim language nor any evidence in Appellant’s Specification requires interpreting the transporting limitation to require “some distance” that would distinguish Rudy’s disclosures.

Further, contrary to Appellant’s arguments that Rudy does not teach transporting food portions to “a *selected* one of the plurality of second

cutting devices” (App. Br. 27; *see also* App. Br. 27–29; Reply Br. 10–13), Rudy teaches or suggests that limitation with its description of a flexible ribbon and plow that guide food pieces to different positions on the conveyor belts (Rudy col. 7, ll. 46–65). *See* Non-final Act. 10 (“Rudy’s flexible ribbon ‘selects’ the leftmost profile portion to continue to the leftmost cutting blade and the rightmost profile to continue to the rightmost cutting blade”); *accord* Rudy col. 7, ll. 25–65 (“Since the longitudinal pieces may be of different size, weight and shape, it is desirable to further process each piece independently of the other. Accordingly, the two longitudinal pieces are caused to be separated laterally [by flexible ribbon 138 and plow member 140] for subsequent individual processing.”). Reading the claim language in view of Appellant’s Specification, which does not further define or limit the claim language, we agree with the Examiner that Rudy’s teachings regarding a ribbon and plow that separate and guide food pieces to different positions on a conveyor belt, and therefore to different measuring devices and cutters at the outfeed end of Rudy’s apparatus, falls within a broad but reasonable interpretation of the disputed limitation. *Cf.* Spec. 7 (“transfer means such as conveyors with deflector means can be placed where the transfer and therewith the placing of the strip in the one or more of the further cutting devices is possibly controlled by the portion-cutting arrangement’s computer means”).

Appellant additionally argues the cited art fails to teach or suggest the claimed “first second cutting profile.” App. Br. 29–35. According to Appellant, “[a]lthough Kim arguably teaches the concept of initially planning the entire cutting path of the food item” (App. Br. 32), “the first cutting profile of Kim describes nothing more than a cutting path for initial

and subsequent cuts of an entire, single food item as it solitarily progresses along a conveyor belt” (App. Br. 33). Appellant argues, “[u]nlike Kim, the instant application claims ‘a *first* second cutting profile for cutting *each one of said strips into pieces.*’” App. Br. 33. Stated differently, Appellant argues “Kim fails to disclose cutting a *plurality* of pieces from the *single* original food item that are subsequently and independently cut using a second cutting profile.” App. Br. 33.

We disagree with Appellant. First, Appellant’s arguments attack Kim individually without substantively addressing the combined teachings of Rudy and Kim. *See In re Keller*, 642 F.2d 413, 426 (CCPA 1981) (“one cannot show non-obviousness by attacking references individually where, as here, the rejections are based on combinations of references”). Further, contrary to Appellant’s arguments that Kim only determines a manner in which to cut a single food item (App. Br. 32–34), we agree with the Examiner that Kim describes cutting a plurality of food pieces from a single original food item (*see* Ans. 15–16 (citing Kim Fig. 11, ¶ 67); Kim Fig. 11, ¶¶ 34 (“**FIG. 11** shows a from elevation view of a plurality of portions to be cut from a foodstuff . . .”), 67). Moreover, as cited by the Examiner, Rudy teaches cutting an original food item and separating the cut pieces for subsequent cutting (*see, e.g.*, Rudy, Abstract (“utilizing the computer to control the operation of a plurality of high pressure water jet cutters to cut the food products to reduced sizes as dictated by the computer program”)), and Appellant’s arguments do not substantively rebut the Examiner’s findings regarding the combined teaching of the prior art.

Accordingly, having considered each of Appellant's arguments relating to independent claims 55, 61, and 64, we disagree with Appellant and sustain the Examiner's rejection of claims 55, 61, and 64.

B. Dependent claims 59, 60, 62, 63, 65, 66, 68, and 69

Appellant argues "Rudy fails to teach cutting a food item into pieces having predetermined dimensions and predetermined weight," as recited in claims 59, 60, 62, 63, 65, 66, 68, and 69. App. Br. 35–39. Specifically, Appellant acknowledges that Rudy teaches cutting food portions to a predetermined weight, but Appellant argues Rudy's additional disclosures of cutting food portions into a predetermined "size," "shape," or "volume" is not equivalent to cutting food portions to a predetermined dimension, as claimed. App. Br. 35–39.

We disagree with Appellant. Among other disclosures, Rudy teaches "the cutting of food products to any desired profile shape, independently of weight or while maintaining a predetermined weight." Rudy col. 1, ll. 62–65. We agree with the Examiner that a person of ordinary skill would have understood Rudy's disclosures of a predetermined shape and size combined with a predetermined weight to teach or at least suggest "predetermined dimensions," as claimed. *See* Ans. 14.

Accordingly, having considered each of Appellant's arguments relating to dependent claims 59, 60, 62, 63, 65, 66, 68, and 69, we disagree with Appellant and sustain the Examiner's rejection of dependent claims 59,

60, 62, 63, 65, 66, 68, and 69, as well as dependent claims 56–58 and 67, which Appellant did not separately argue.

II. The Written Description and Indefiniteness Rejections

Each of claims 55–69 recites a “first second cutting profile” and “second second cutting profile.” *See* Ans. 9–13. The Examiner finds Appellant’s Specification does not provide written description support for an interpretation of the claims in which the first second cutting profile and the second second cutting profile are different because, based on the Specification, “there is one profile that is either being verified or altered, not another second, second cutting profile being generated.” Ans. 10.

Similarly, the Examiner concludes each claim is indefinite because “[t]here is no understanding as to why the first second cutting profile is created and what happened to it when the second second cutting profile is used to cut the strips into pieces.” Ans. 11.

Appellant argues the methods of claims 55–69 require that a first measuring device creates two profiles (i) a first cutting profile, and (ii) a first second cutting profile, and a second measuring device creates a third profile, (iii) a second second cutting profile. Reply Br. 3–9. Appellant explains that the second second cutting profile serves to account for any shifting of a food piece that may have occurred while transporting it from the first cutting device to the second cutting device. Further, Appellant explains that the claimed methods require that “[i]t is the second second cutting profile that is actually used for cutting the strips at the second cutting device, because it compensates for any changes in the strips” (Reply Br. 9), and there is no requirement that the first second cutting profile be used. Reply Br. 6–8.

As Appellant acknowledges, the claimed methods are limited to instances in which only the second second cutting profile is used (and the first second cutting profile is unused). We disagree with the Examiner that drafting the claims in such a manner renders the claims indefinite or lacking in written-description support. Appellant acknowledges that the claimed methods do not include instances in which the first second cutting profile and the second second cutting profile are the same, but Appellant argues, and we agree, “[t]he fact that the claim does not consider a situation where the profiles may be identical is merely the Appellant implementing his right to choose which embodiments of the invention to claim, which steps to protect.” Reply Br. 8.

Accordingly, we do not sustain the written description or indefiniteness rejections of claims 55–69.

DECISION

For the above reasons, we affirm the Examiner’s rejection of claims 55–69 under 35 U.S.C. § 103(a). We reverse the Examiner’s rejections of claims 55–69 under 35 U.S.C. § 112, first paragraph and second paragraph.

No time period for taking any subsequent action in connection with this appeal may be extended. 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED